No. 93-650

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

STEVEN R. HOLLAND AND GLENNYSS E. HOLLAND,
husband and wife,

Petitioners,

vs.

JOHN DEERE CO., a Delaware corporation; and
FOUR COUNTY TRACTOR EQUIPMENT CO.,
a Texas corporation,

Respondents,

vs.

DEERE & COMPANY,

Additional Party-Respondent.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF IN OPPOSITION

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RULE 29.1 STATEMENT

Respondent, FOUR COUNTY TRACTOR EQUIPMENT CO., is a Texas corporation which has no parent company and no corporate subsidiaries.

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STATEMENT OF THE CASE

Respondent FOUR COUNTY TRACTOR EQUIPMENT CO. ("Respondent") accepts Petitioners' Statement of the Case, with the following additions and corrections.

PROCEDURE

On March 24, 1992, because of Petitioners' failure to timely respond to Respondent's Motion for Summary Judgment, Respondent filed a Motion for Default Judgment. On March 25, 1992, Petitioners filed an Application and Brief in Support for Order Allowing Out of Time filing of a Response to Respondent's Motion for Summary Judgment, and a response to Respondent's Motion for Default Judgment.

FACTS

On the date of the accident forming the basis of this action, Petitioner Steven Holland[1] had been experiencing difficulties with the top starter solenoid bolt of the subject tractor. (Pet. App. 16). The Petitioner had also experienced problems like this in the past, and had replaced the starter solenoid bolts on the tractor on at least two separate occasions. Petitioner had managed to start the subject tractor on the morning of the accident by standing on the ground while holding battery cables and other wire

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[1] As used herein, "Petitioners" will refer to Petitioners Steven R. Holland and Glennyss E. Holland. "Petitioner" or "Holland" will be used to refer to Steven R. Holland alone.

connections into the stub of the bolt on the top of the starter solenoid cap. (Pet. App. 16).

Just prior to the accident, the subject tractor would not start, and Petitioner assumed there was a problem with the bottom solenoid bolt. Petitioner then attempted to determine what the problem was by reaching in near the starter solenoid with a pair of pliers without disconnecting the battery cables. (Pet. App. 16, 17). This caused the tractor (which was in gear) to start.

The Petitioner knew that touching metal to a starter solenoid could start the vehicle to which the solenoid was attached (this process is commonly referred to as "by-pass" starting), and create a potentially dangerous situation. Prior to the accident, Petitioner had seen a self propelled swather[2] by-pass started. On that occasion Petitioner had observed the swather start to lunge and spin when it was by-pass started in gear. (Pet. App. 16).

The Operator's Manual of the subject tractor contained numerous warnings regarding servicing the tractor's electrical system, starting the tractor from the ground, and leaving the tractor in gear. (Pet. App. 20). The manual expressly states that an operator should "[n]ever attempt to start or operate the tractor except from the operator's station." (Pet. App. 20). The manual warns that the battery ground cable should always be disconnected before "working on the electrical system or working in any area where you might accidentally contact electrical components." (Pet. App. 20). Additionally, there are two prominently typed warnings cautioning the

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[2] A swather is a machine which cuts hay. (Pet. App. 3).

operator to always place the transmission in park when the tractor is stopped or dismounted. (Pet. App. 21). Finally, the operator is told that "[i]f the engine must be run while servicing equipment, disconnect three-wire multiple connector in wiring to power front-wheel drive control valves located just behind front axle." (Pet. App. 21).

SUMMARY OF ARGUMENT

Petitioners' invocation of the jurisdiction of this court is based only on the argument that the court below erred in applying Oklahoma products liability law and Fed. R. Civ. P. 56 to undisputed facts. As set forth in Sup. Ct. R. 10.1, "[a] petition for a writ of certiorari will be granted only when there are special reasons therefor." In this case, Petitioners raise no issue of interpretation of any unclear statute or rule, no constitutional issue, no claim of conflict among the circuits, and no issue of significance beyond the facts of this case. In fact, Petitioners' argument is not even outcome-determinative in the case at bar, as the summary judgment entered by the district court in favor of Respondent may be affirmed regardless of the disposition of the specific issue raised by Petitioners.

In its Motion for Summary Judgment, Respondent alleged specific facts, which, if true, entitled Respondent to judgment against Petitioners as a matter of law. Petitioners have not controverted any of these material facts,

and have simply argued that questions pertaining to adequacy of warnings and assumption of risk are jury questions, thus not appropriate for summary judgment. Although Petitioners now claim that the summary judgment was based on improperly drawn inferences, Petitioners did not challenge any inferences at the district court level, and therefore cannot raise this issue on appeal.

Furthermore, because any inferences drawn by the trial court from the undisputed facts were the only logical and reasonable inferences which could be drawn from the evidence presented to the court by the parties, reliance upon them would be entirely proper. Additionally, even ignoring any inferences, based on the facts and direct evidence, Petitioners have failed to identify any genuine issues of fact which would preclude a judgment for Respondent.

ARGUMENT AND AUTHORITY

PROPOSITION I.

PETITIONERS HAVE WAIVED ANY CHALLENGE TO INFERENCES DRAWN BY THE DISTRICT COURT

In reviewing a grant of summary judgment, the standard of review is *de novo,* and an appellate court may affirm on "any proper grounds found in the record to permit conclusions of law." *City of Chanute v. Williams Natural Gas Co.*, 955 F.2d 641, 647 (10th Cir.), *cert. denied,*

113 S.Ct. 96 (1992). In this case, Petitioners do not challenge any of the undisputed material facts, but merely the inferences supposedly drawn therefrom.

Petitioners have argued urgently on appeal that the District Court drew improper inferences from the material and undisputed facts submitted by Respondent in support of its Motion for Summary Judgment. However, the issue of proper/improper inferences was not raised by the Petitioners at the time when it should have been raised – in their response to Respondent's Motion for Summary Judgment.

> It is a well-settled rule that a party opposing a summary judgment motion must inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered. *If it does not do so, and loses the motion, it cannot raise such reasons on appeal.*

Liberles v. County of Cooke, 709 F.2d 1122, 1126 (7th Cir. 1993). (Emphasis supplied). *See also Frank C. Bailey Enterprises, Inc. v. Cargill, Inc.*, 582 F.2d 333 (5th Cir. 1978); *Crompton-Richmond Co., Inc. – Factors v. Smith*, 392 F.2d 577 (3d Cir. 1967); *Edward B. Marks Music Corp. v. Continental Record Co.*, 222 F.2d 488 (2d Cir.), *cert. denied*, 350 U.S. 861 (1955).

> Failure to raise an issue, objection or theory or relief in the first instance to the trial court is generally fatal. Similarly, factual assertions that defeat summary judgment cannot be presented for the first time to an appellate court, and only those matters properly before the district court for summary judgment consideration are subject to appellate review.

Denis v. Liberty Mutual Insur. Co., 791 F.2d 846, 848-49. *See also Garner v. Pearson*, 732 F.2d 850 (11th Cir. 1984).

The law is clear that Petitioners have waived any challenge which could have been presented regarding the propriety of inferences drawn by the District Court. Petitioners' theory, having not been produced at the District Court level, cannot now, as a matter of law, be raised on appeal.

PROPOSITION II.

A TRIAL COURT MAY RELY ON INFERENCES IN RULING ON A MOTION FOR SUMMARY JUDGMENT

Even if Petitioners' argument is considered, it must fail because it is clearly proper for a court to consider inferences when ruling on a motion for summary judgment. If a summary judgment motion is properly made, the "nonmoving party [must] go beyond the pleadings and designate 'specific facts showing that there is a genuine issue for trial.' " *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986) (citing Rule 56, Fed. R. Civ. P.). The plaintiff is required to produce evidence that could support a jury verdict. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 244 (1986). The court must decide if the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one sided that one party must prevail as a matter of law. *Id.* at 251-52. "The mere existence of a scintilla of evidence in support of the party's position will be insufficient. There must be evidence on which the jury could reasonably find for the [party]." *Id.* at 252.

Viewing the evidence before it, "the court must draw any permissible inference from the materials . . . in favor of the non-moving party, *Matsushita Electric Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

However, courts are "not required to evaluate every *conceivable* inference which can be drawn from evidentiary material, but only reasonable ones." *Lucas v. Dover Corp., Norris Div.*, 857 F.2d 1397, 1401 (10th Cir. 1988). (Emphasis in the original). *See also Spring v. Sheboygan Area School District*, 865 F.2d 883, 886 (7th Cir. 1989). Moreover, when "only a single conclusion is plausibly inferable from the uncontradicted facts, Rule 56 can properly be invoked." *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990). *See also Oliver v. Digital Equip. Corp.*, 846 F.2d 103, 109 (1st Cir. 1988); *Binkley Co. v. Eastern Tank, Inc.*, 831 F.2d 333, 337 (1st Cir. 1987).

In some cases, even questions which are normally questions of fact become questions of law if " 'only one inference is possible from the evidence.' " *Edwards v. Consolidated Rail Corp.*, 567 F. Supp. 1087, 1113 (D.D.C. 1983) (quoting *Quints v. Legal Times*, 506 F. Supp. 554, 564 (D.D.C. 1981)), *affirmed*, 733 F.2d 966 (D.C. Cir.), *cert. denied*, 469 U.S. 883 (1984). *Accord, Zweig v. Hearst Corp.*, 521 F.2d 1129, 1134-36 (9th Cir.), *cert. denied*, 432 U.S. 1025 (1975).

In the case at bar, Petitioners have not specifically pointed to the inferences which they claim were improperly drawn. They argue generally, however, that they deal with the "state of mind," or knowledge of the Petitioner,

contending that these kinds of issues are somehow generally immune from disposition at the summary judgment stage. This is simply not the case.

As has been emphasized repeatedly by this court, a non-moving party cannot defeat summary judgment through unsupported speculation. This is even true "in cases where elusive concepts such as motive or intent are at issue." *Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990). The normal rules regarding summary judgment are not suspended merely because in ruling on the motion "conclusions must be drawn from agreed or uncontradicted facts." *Griggs-Ryan v. Smith*, 904 F.2d 112, 116 (1st Cir. 1990). *See also Local No. 48 v. United Brotherhood of Carpenters and Joiners of America*, 920 F.2d 1047, 1051 (1st Cir. 1990). A cause of action which relates to state of mind does not entitle a party to a trial. The party still must demonstrate that there is a disputed question of fact. *See Loeb v. Glove Newspaper Co.*, 489 F. Supp. 481, 487 (D.C. Mass. 1980).

In the case at bar, Petitioners have repeatedly argued that issues of disputed fact have been raised regarding Petitioner's knowledge. They fail to point to any evidence supporting these allegations, however, and rely solely on their claim that this is an inappropriate subject for summary judgment. As demonstrated above, this is not sufficient to defeat a summary judgment under the facts of this case.

PROPOSITION III.

PETITIONERS HAVE FAILED TO DEMONSTRATE ANY GENUINE ISSUE FOR TRIAL

Notwithstanding the fact that Petitioners have never contradicted Respondent's material facts, nor offered any evidence or argument relative to the elements of a products liability action, and have depended solely on contentions that the issues of duty to warn and assumption of the risk are jury questions, Petitioners contend that the evidentiary burden required of them has been met through properly drawn inferences. The only pertinent question is: How?

Since the summary judgment standard requires a court to determine whether non-movants have submitted evidence supporting the essential elements of their claim by viewing "the evidence presented through the prism of the substantive evidentiary burden," *Anderson*, 477 U.S. at 254, the court must examine the burden plaintiffs are required to meet in a manufacturers' products liability action.

Because this is a diversity action, the law of the forum state is applied. *See Skimore, Owings & Merril v. Canada Live Assurance, Co.*, 907 F.2d 1026, 1027 (10th Cir. 1990). The Oklahoma Supreme Court has established three elements a plaintiff must prove to be successful in a manufacturers' product liability action. A plaintiff must prove (1) that the product was the cause of the injury; (2) that the defect was in the product at the time it left the manufacturer's or distributor's possession; and (3) that the defect made the product unreasonably dangerous to

the consumer. *Kirkland v. General Motors Corporation*, 521 P.2d 1353, 1363 (Okla. 1974).

In order to avoid a summary judgment, plaintiffs then must produce evidence establishing all three elements which are essential to their cause of action. If their evidence is "merely colorable, or is not significantly probative" summary judgment will be proper. *Anderson*, 477 U.S. at 249.

In this case, therefore, the analysis which must be performed centers on the undisputed evidence introduced in this case by the parties. The central issue is not whether that evidence favors Respondent, but whether its probative value rises to the level necessary to create a genuine issue regarding all elements of Petitioners' cause of action.

A. EVIDENCE REGARDING CAUSATION

An analysis of the undisputed facts reveals that Petitioners have not established an issue regarding the element of causation. *See Kirkland*, 521 P.2d at 1363 ("first of all plaintiff must prove that the product was the cause of the injuries; the mere possibility that it might have caused the injury is not enough."). If the injured party caused his or her own injuries, causation is missing and no recovery may be awarded. *Id.* at 1366. The plaintiff might cause injury by negligence, misuse or abnormal use. *Id.*

In this case, the Petitioners have presented no evidence regarding causation other than the evidence that an injury occurred. As the Oklahoma Supreme Court has

specifically stated, this is not enough to "shift the burden" to the defendant. *See Kirkland*, 521 P.2d at 1363. Thus, a summary judgment in favor of Respondent is proper simply because Petitioners have failed to raise a genuine issue of fact with regard to an essential element of their claim.

Petitioners apparently are asserting that causation can be established through the inferences they claim must be drawn from the evidence. Petitioners assert that the District Court erred in concluding that: "Holland stated in his deposition that the tractor would not start without being in neutral or park, but in that context he was obviously talking starting the tractor by way of the keyed ignition rather through bypass starting." (Pet. App. 18).[3] Petitioners contend that Holland's understanding was that the subject tractor could only be started in neutral or park, and that the proper inference derived from this testimony should have established causation. However, the following excerpt from Petitioner's deposition makes it obvious that the inference drawn by the District Court is the only reasonable inference which could be drawn.

> Q. Do you have any recollection or knowledge – do you have any knowledge of whether the tractor would generally start if – when a driver is sitting in the seat, sticks the key in the ignition, turns the key and nothing happens, do you have any knowledge of whether the tractor has to be in – out of gear in order to start?

---

[3] On appeal, the Tenth Circuit Court of Appeals agreed with the District Court's conclusion. (Pet. App. 7).

A. Yes, it does

Q. So if you started it that way – if you turned – proceeded as you just described and turned the key and it didn't start, would that suggest to you any steps that you might take to determine whether there's a small problem or –

A. Well, normally –

Q. Did that suggest any diagnostic steps that you should take to determine the problem?

A. Sure. The first thing you do is usually to check to see if it's in gear.

Q. Why is that?

A. Because it won't start without being in neutral or in park.

(Resp. App. 4).

B. DEFECT AT TIME PRODUCT LEFT RESPONDENT'S CONTROL

1. Design or Manufacture.

Petitioners also must prove that there is a material issue as to whether the product at issue contained a defect at the time it left the Respondent's possession and control. *Kirkland,* 521 P.2d at 1363. A plaintiff cannot establish this claim by requesting a court to draw the necessary conclusions from evidence which is "merely consistent with [plaintiff's theory] but suggest[s] with equal force an inference of the nonexistence of [plaintiff's theory]." *McCready v. United Iron and Steel Co.,* 272 F.2d 700, 702 (10th Cir. 1959). "Evidence which presents a mere choice of probabilities . . . as the proximate cause of damage creates only conjecture or speculation on which a

verdict for plaintiff cannot stand. The evidence must bring the theory of plaintiff to the level and dignity of a probable cause." *Id.*

A product is not defective when it is safe for normal handling and consumption. . . . " *Duane v. Oklahoma Gas & Elec. Co.*, 833 P.2d 284, 286 (Okla. 1992). A product may be defective because of flaws in design or manufacturing, or because of a failure to warn. *See Mayberry v. Akron Rubber Mach. Corp.*, 483 F. Supp. 407, 412 (N.D. Okla. 1979). In the case at bar, Petitioners are apparently claiming that the tractor's "defect" was that it could be by-pass started while in gear.

Petitioners' only evidence of a design or manufacturing defect was the fact that an accident occurred. In such a case, a directed verdict or summary judgment is appropriate. *See Randolph v. Collectramatic, Inc.*, 590 F.2d 884, 848-49 (10th Cir. 1979). As a rule, "a manufacturer is under no duty to make products absolutely safe from every conceivable potential injury." *Kelley ex rel. Kelley v. Rival Mfg. Co.*, 704 F. Supp. 1039, 1044 (W.D. Okla. 1989). Since Petitioners completely failed to address this issue, it appears that they might be requesting that the Court, through judicial notice, determine as a matter of law that John Deere Tractors are defective.

To draw whatever conclusions Petitioners seek the court to draw regarding this element would require the court to make a determination while assuming that more conclusive evidence would be offered at trial. However, a non-movant in a summary judgment context is not entitled to beneficial inferences drawn from evidence which *could possibly* be presented by the non-movant at trial. *See*

In Re Joint E. & So. Dist. Asbestos Litig., 774 F. Supp. 113, 114 (S.D.N.Y. 1991).

2. Duty to Warn

Petitioners also claim Respondent failed to warn of the tractor's ability to be by-pass started while in gear. A failure to warn itself may make a product defective, and a seller is required to warn of a danger which it has reason to anticipate may result from a particular use. *Duane*, 833 P.2d at 286. There is, however, no duty to warn of a danger that is obvious or generally known, nor is there a duty to warn a knowledgeable user of the product. *Id.*

A duty to warn arises only when the consumer can reasonably be said to be ignorant of the dangers to be warned of. *Cox v. Murray Ohio Mfg. Co.*, 732 F. Supp. 1555, 1561 (W.D. Okla. 1987). There is no duty to warn where the danger is obvious to the consumer or *actually known to the person injured. Id.* at 1562. (Emphasis supplied.) *See also Berry v. Eckhardt Porsche-Audi, Inc.*, 578 P.2d 1195 (Okla. 1978).

The undisputed facts establish that Petitioner had extensive experience with tractors. He knew a tractor could be by-pass started. He has observed that a swather, also a self-propelled farm machine, lurched forward when by-pass started. He had started his tractor before the accident by standing on the ground and holding battery cables and wires onto the bolt stub on the starter solenoid cap, and therefore knew that the tractor could be started from that position. On prior occasions when Petitioner had worked on the starter solenoid bolts Petitioner

had disengaged the battery before removing the starter solenoid from the tractor. Petitioner admittedly knew the potential for danger which existed in the situation at the time of his injury.

Petitioners contend that Holland did not have the requisite knowledge of the tractor's "defect" because he testified that the tractor will not start without being in neutral or park. However, as noted above, that testimony was in response to a question regarding whether the tractor would start if a driver was sitting in the seat, placed the key in the ignition, turned it, and nothing happened. Therefore, the testimony does not support the illogical conclusion that Petitioner did not understand that by-pass starting the tractor would also by-pass that safety mechanism. As noted by the Court of Appeals in its judgment, "[d]rawing inferences favorably to the party opposing summary judgment does not mean taking testimony out of context." (Pet. App. 7).

Petitioner was also a sophisticated user of the product at issue in this action, based on his knowledge and experience. The "sophisticated user" doctrine in product liability cases insulates a manufacturer or supplier of products from liability where the user has reason to know of any dangerous condition inherent in the product. Assuming *arguendo* that there was a defect in the product, about which no evidence has ever been introduced by Petitioners, it was a defect commonly known to all self-propelled implements and known as well to Petitioner through previous experience. The "sophisticated user" doctrine:

> insulates from liability a person who supplies a product to a knowledgeable industrial user who has reason to know of any dangerous condition which might be inherent in the product.
>
> Although the doctrine is frequently applied in the context of bulk suppliers who allegedly have been given inadequate warnings, there is no reason why it is not equally applicable to the designer, manufacturer or installer of a piece of machinery allegedly containing an inadequate safety device.

Terry v. Senoret Chem. Co., No. CIV-87-561-R, slip op. (Nov. 8, 1989, W.D. Okla.) (citations omitted).

A review of Petitioner's testimony indicates without logical debate that a lifetime of experience and knowledge of what could happen when metal was imposed on the two poles of a starter solenoid on any self-propelled equipment qualified Holland as a sophisticated user. As a consequence, the doctrine insulates Respondent from any liability based on allegations that it failed in its duty to warn.

Even if some duty to warn existed, it was more than adequately fulfilled by Respondent. The operator's manual for the subject tractor contains numerous warnings regarding the dangers of working on the tractor's electrical system without first disconnecting the battery. These specifically warn the operator to disconnect the battery cables on any occasion during which the electrical system is the focus of repair or maintenance. Also, the manual warns an operator against attempting to start or operate the equipment if not at the operator's station. (Compare to the verbal instructions given in the 7th Circuit case of

Moran v. Raymond Corp., 484 F.2d 1008, 1015 (7th Cir. 1973), instructions the Court found adequate.)

Further, the manual warns that the transmission should always be placed in park when the tractor is stopped, and that if the operator must run the engine while working on the tractor, to always disconnect the three-wire connector to the power front-wheel drive assembly.

Under the law, where a warning is given, the manufacturer or seller may reasonably assume that it will be read and heeded. *See Cox v. Murray Ohio Mfg. Co.*, 732 F. Supp. at 1562. Despite these warnings contained in the Operator's Manual, which the Petitioner acknowledges having read, Petitioner attempted to work on the electrical system without disconnecting the battery or disengaging the drive train. Further, Petitioner neither placed the subject tractor in park, *nor even turned the ignition switch off* prior to the alleged accident. Clearly, under these circumstances, the duty to warn was adequately fulfilled, if indeed, such a duty even existed.

C. DEFECT MADE PRODUCT UNREASONABLY DANGEROUS

Under *Kirkland*, a plaintiff is required to prove that the alleged defect made the article unreasonably dangerous to him or his property. *Kirkland*, 521 P.2d at 1363. "Unreasonably dangerous" is defined as:

> dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary

> knowledge common to the community as to its characteristics. . . .

Id. at 1362, 63.

In the case at bar, the undisputed facts are illustrative of Petitioner's knowledge regarding the electrical system of the subject tractor, and of what would happen if the poles of the starter solenoid were grounded with a metal object while the implement was in gear. Notwithstanding this awareness of the danger of the situation, Petitioner Steven Holland did not disconnect the battery prior to working on the solenoid, did not determine conclusively that the implement was out of gear, and did not even turn the tractor ignition key off.

A manufacturer has no duty to make a product which is absolutely safe from every conceivable potential injury. *Id.* Respondents only must design and market a reasonably safe product. *See Gates v. Ford Motor Co.*, 494 F.2d 458, 459 (10th Cir. 1974).

Petitioners argue that reasonable inferences could be drawn from the undisputed material facts offered by Respondent in support of its motion for summary judgment, which would establish that the subject tractor was unreasonably dangerous. Petitioners contend that the fact that Petitioner started the tractor without mishap on the morning of the accident, demonstrated that he did not know that there was a "defect" in the product. Petitioners contend that there was nothing different between Holland's action that morning and that evening, when the accident occurred. Petitioners disregard Holland's testimony that he could not remember whether he checked to

see if this subject tractor was in gear that evening. Furthermore, Petitioner testified that the ignition key was on during the time he worked on the electrical system that evening. In addition, Petitioner's testimony regarding the majority of his actions on the day of the accident make it clear that the damaged solenoid bolt had further broken and was apparently not performing at all at the time of the accident. Petitioners claim that even though Holland was aware that placing metal near the twin poles of a starter solenoid was dangerous, that this does not bar the conclusion that the tractor was unreasonably dangerous.

That conclusion would, however, disregard the material and undisputed facts that were before the district court. Those facts include the fact that by Petitioner's own admissions, the dangers of cross starting equipment such as this tractor were known to him, and even experienced first hand when he attempted to start a swather while that equipment was in gear; and that Petitioner knew that working on the electrical system of the subject tractor, without disconnecting the battery, could create a dangerous situation.

Finally, Petitioners attempt to convince the court that Holland's testimony showed that he did not know how to by-pass start a swather or a tractor because he did not know if they were supposed to be in gear. Contrast this conclusionary allegation with the undisputed material fact presented by Respondent through Petitioner's testimony as set forth below:

Q. Did you observe that if metal touched the solenoid that it could start the –

A. Sure.

Q. Did that surprise you?

A. No. I knew it would happen.

(Resp. App. 7).

In the instant case, it is clear from the evidence and the only reasonable inferences which may be drawn therefrom, that the stage was set for the Petitioner's injuries when Petitioner chose to use the tractor, doing whatever it took to start it, notwithstanding the fact that a bolt which affected the tractor's ability to start normally was broken. Petitioner disregarded his own knowledge, and disregarded warnings in the tractor's operators' manual in so doing.

CONCLUSION

For all of the reasons and arguments set forth above, Respondent Four County Tractor Equipment Company urges the court to deny *certiorari* in this case.

Respectfully submitted,

FOUR COUNTY TRACTOR
EQUIPMENT COMPANY

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RESPONDENT'S APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

STEVEN R. HOLLAND and GLENNYSS E. HOLLAND, husband and wife, Plaintiffs, vs. JOHN DEERE, CO., a Delaware corporation; and, FOUR COUNTY TRACTOR EQUIPMENT CO., a Texas corporation, Defendants.	)	No. CIV-91-977C

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DEPOSITION OF STEVEN R. HOLLAND

Taken on behalf of the

Defendants

on September 30, 1991

in Oklahoma City, Oklahoma

****

* * *

[p. 14] A May 16th.

Q May 16th, 1965?

A '4 – '4, excuse me.

Q See, I'm going to get you in trouble before you leave here today. And what – Do you recall what kind of tractor that was?

A 4430.

Q Would that have been one of your father's tractors?

A That's my father's tractor.

Q And that would have been when you were probably a junior in high school or so?

A Yes.

Q Now, the 4430, that would have been a John Deere tractor; is that right?

A Yes.

Q Was that a new tractor, do you recall, back then?

A My dad bought it new, brand-new.

Q When you started buying your own tractors and the ones that you bought – the one that you bought from your father, the 4430, did you take the time to read the owner's manuals on those tractors?

A Yes, I did.

Q Is it your practice to always read the owner's [p. 15] manual on any new tractor that you bought or even any –

A Any equipment I read the owner's manual, operator's manual.

Q Do you have equipment other than tractors on your farming operation?

A Yes.

Q Can you just briefly describe for me the other types of farm equipment you have on your farm or have had on your farm?

A I've owned several John Deere chisels, 27 foot mostly. I've got three 77 cotton strippers – two 83, excuse me. Seventy-seven was before that.

Q You have two 83 cotton strippers?

A Yes, sir. I've got an offset disk but it's a Cisco , [sic] I think. I can't – I don't remember. It's a Task Master is the name of it. I think Cisco made it. I'm not sure about that. I've still got a small disk, tandem disk, John Deere, that my dad owned. I've got two 8300 John Deere drills. I've got a Hills – or a Spring Tooth Harris, 33 feet. I forget when you're trying to ask me all of this.

Q That's all right. I just want to know just generally what kind you've had or currently had, other farm equipment.

A We've got probably 20 cotton trailers. We've

* * *

[p. 106] your procedure for starting the tractor that morning?

A My key was left in the tractor; and I went out, tried to turn it on and nothing happened.

Q Did you check to see whether the tractor was in park or –

A I can't recollect that.

Q Do you have any recollection whether the tractor has to be in – out of gear in order to start in the manner that you just described – the procedure that you just described?

A Say that one more way now?

Q Do you have any recollection or knowledge – do you have any knowledge of whether the tractor would generally start if – when a driver is sitting in the seat, sticks the key in the ignition, turns the key and nothing happens, do you have any knowledge of whether the tractor has to be in – be out of gear in order to start?

A Yes, it does.

Q So if you started it that way – if you turned – proceeded as you just described and turned the key and it didn't start, would that suggest to you any steps that you might take to determine whether there's a small problem or –

A Well, normally –

Q Did that suggest any diagnostic steps that you [p. 107] should take to determine the problem?

A Sure. The first thing you do is usually to check to see if it's in gear.

Q Why is that?

A Because it won't start without being in neutral or in park.

Q So when you stuck the key in the ignition, turned –

A I didn't stick the key in. It was already in.

Q When you came out, sat in the seat, turned the key and nothing happened, what was the first thing that you did? Check the gears?

A I don't remember.

Q Well, would have – among the things that you did, would you have checked to see whether the tractor was in park or neutral?

A Normally, yes, I would check to see if it was in neutral or park, because a lot of times you have to wiggle them.

Q Now, on this day given that you – you know, testified that you know that the tractor would not start unless it was in park or in neutral, would not start for a person who was sitting in the seat turning the key like the manual says to start the tractor, somewhere in that checklist of things that you would have done, you would

* * *

[p. 154] Q Why was it sold?

A I was needing the money to pay for the payments on the other John Deere tractors.

Q Were there – on August 22nd, 1989, were there other tractors available to you that – to which you could have attached the post hole digger?

A The only one that would have been would have been my son's. The big 4-wheel drive is too big to maneuver in these kind of places to dig post holes.

Q Where was your son's tractor?

A I don't know.

Q Did you attempt to determine that that day?

A I don't remember. He usually custom bales, so I'm sure it was on a baler. You're talking about equipment. I've got two John Deere balers, two John Deere swathers, one John Deere grinder. They had come to me after I sat here a little while.

Q About that swather that started in the matter that you testified earlier, elaborate on how that happened. What happened?

A I just – basically we couldn't get it to start, so we reached up there and hit between the two solenoid posts and it started – or attempted to start. It never did start. That's when it started making the circle.

Q Circle of electricity?

[p. 155] A No. A circle – the swather will just set there and go around in a circle.

Q Now, when was that?

A I couldn't tell you the dates. It was in the '80's.

Q Before this accident –

A Yes.

Q – that you're talking about?

A Yes.

Q Where was this done?

A In Kiowa, Kansas.

Q What did you think you had seen when an attempt was made to start that swather in that fashion?

A I seen that it tried to take off.

Q Did you observe that if metal touched the solenoid that it could start the –

A Sure.

Q Did that surprise you?

A No. I knew it would happen.

Q What other experience had you – that made you know that back in the '80's when you were talking about buying this swather?

A What other –

Q You knew it would happen. How did you know?

A I watched it been done several times.

* * *